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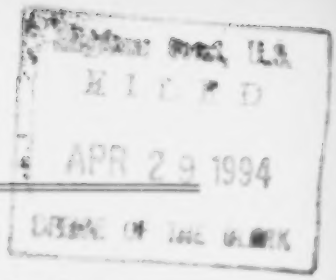

In The

Supreme Court of the United States

October Term, 1993

CARL V. LAMB,

Petitioner,

v.

UNION CARBIDE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant certiorari to review the fourth circuit's affirmance of the district court's fact specific determination that Carl Lamb failed to meet his burden of showing the existence of a disputed issue of material fact necessary to defeat Union Carbide's Motion for Summary Judgment.

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STATEMENT OF THE CASE

The Petitioner, Carl V. Lamb, seeks review in this Court of the affirmance by the fourth circuit of the district court's determination that he could not meet his burden of showing the existence of a disputed issue of material fact necessary to defeat Respondent's motion for summary judgment.

The Statement of the Case presented to this Court by the Petitioner contains scant references to the record. A review of the record and the affidavits filed by Petitioner in support of his opposition to summary judgment, *see* Petition at A8-A22, reveals that the Petition contains numerous factual allegations which were not supported by Petitioner's affidavits and/or never argued before any of the courts below. This statement is based upon all the affidavits filed in this case including those filed by Union Carbide and attached to this Response.

On November 28, 1988, the Respondent, Union Carbide Chemicals and Plastics Company Inc. formerly known as Union Carbide Corporation ("Union Carbide"), entered into a contract with Midwest Technical, Inc. ("MTI") for the temporary assignment of MTI employees to various Union Carbide facilities in various classifications. The contract gave Union Carbide the unfettered discretion to terminate the request for assignment of MTI employees at any time and without restriction and required MTI to thereafter increase or decrease the number of its employees so assigned.

Pursuant to the contract Union Carbide requested MTI to provide it an engineer to perform technical work in the field of industrial heating, ventilation, and air

conditioning ("HVAC") at one of Respondent's South Charleston, West Virginia facilities. Petitioner, an employee of MTI, received this temporary assignment.

By mid 1991, Union Carbide determined that it no longer needed the HVAC services from MTI being provided by Lamb. MTI was notified of this decision, and, apparently, Lamb was laid off by MTI.

Prior to this decision, Union Carbide had hired Norman J. Mabie as an in-house engineer. Petitioner alleges that Mabie was hired as part of a "plot" to replace him. The undisputed facts establish that Mabie was assigned to an internal work group different than Lamb's and, at the time the motion for summary judgment was filed, had only worked on one HVAC project.

Thad Epps, the Union Carbide spokesman quoted in the newspaper article attached to the Petition, did not remember ever hearing of Carl Lamb before being advised of the filing of the complaint in this action. As is obvious from the article, at the time Mr. Epps made the statements referred to in the article, he was not referring to Lamb.

Lamb initiated this action in the United States District Court for the Southern District of West Virginia. His complaint alleged three counts: tortious interference with his contract with MTI by James Bowyer, the Union Carbide manager who allegedly orchestrated Mabie's hire; libel arising out of certain general statements made by Thad Epps, a Union Carbide spokesman which were quoted in a newspaper article printed in the local paper; and slander arising out of statements Mabie allegedly made about Lamb's work.

Lamb's complaint was referred to United States Magistrate Judge Jerry D. Hogg for resolution of discovery disputes and a report and recommendation concerning Union Carbide's motion for summary judgment. The magistrate allowed Lamb to designate what discovery he would need from Union Carbide to respond to the pending summary judgment motion. After receiving the requested discovery, Lamb filed his response. After holding a hearing and considering the briefs, the magistrate filed a report-recommendation recommending Union Carbide's motion for summary judgment be granted. This report-recommendation is attached to this response at App. 1. Thereafter, Lamb filed objections. The district court, Chief Judge Charles H. Haden, II, adopted the report-recommendation and dismissed Lamb's complaint. Lamb's appeal to the United States Court of Appeals for the Fourth Circuit was rejected in an unpublished per curium opinion adopting the reasoning of the court below. Thereafter, Lamb unsuccessfully sought rehearing and rehearing in banc in the fourth circuit and now petitions this Court.

ARGUMENT

I. NO ISSUE WORTHY OF THIS COURT'S REVIEW ON CERTIORARI IS PRESENTED BY THE CIRCUIT COURT'S UNPUBLISHED PER CURIUM AFFIRMANCE OF THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT.

Petitioner argues that the decision below is worthy of this Court's review based upon a supposed conflict both with decisions of this Court and with a decision of

another circuit. Even assuming that these contentions are correct, which they are not, no questions are presented by the petition that are worthy of this Court's review. This Court's Rule 10.1 provides that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." This Court's scarce resources should be reserved for cases with implications "beyond the facts and parties involved." *Boag v. MacDougall*, 454 U.S. 364, 368, 102 S.Ct. 700, 702, 70 L.Ed.2d 551 (1982) (Rehnquist, J., dissenting).

The decision appealed from does not represent a conflict in the circuits necessitating this Court's attention. The opinion below is an unpublished per curium affirmance. On its face the opinion discloses that, by court rule, it is not binding precedent. Petition at A5. Moreover, the circuit court opinion affirms an unpublished district court opinion adopting an unpublished report-recommendation from the magistrate. These opinions are likely to remain unknown to anyone outside the parties involved. Finally, the opinion with which this opinion allegedly conflicts involves the application of another state's laws.

While couched in constitutional terms and littered with allegations that this Court's precedents were ignored, the Petition merely argues that the well-settled standards applicable to a determination of whether summary judgment is appropriate, *see Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), were misapplied by the courts below. Those types of errors are to be corrected in the courts of appeals. As Justice Stevens noted in his concurring opinion in *Watt v. Alaska*, 451 U.S. 259, 275 (1981):

> The federal judicial system is undergoing profound changes. Among the most significant is the increase in the importance of our courts of appeals. Today they are in truth the courts of last resort for almost all federal litigation. Like other courts of last resort – including this one – they occasionally render decisions that will not withstand the test of time. No judicial system is perfect and no appellate structure can entirely eliminate judicial error. Most certainly, this Court does not sit primarily to correct what we perceive to be mistakes committed by other tribunals. Although our work is often accorded special respect because of its finality, we possess no judicial monopoly on either finality or respect.

See also Ross v. Moffitt, 417 U.S. 600, 616-17 (1974) (Court does not exercise certiorari power merely to review perceived error in applying well-settled rules); *United States v. Johnston*, 268 U.S. 220 (1925) (Court does not grant certiorari to review evidence and discuss specific facts).

Nothing special or important is presented by Lamb's petition.

II. THE CIRCUIT COURT'S AFFIRMANCE OF THE GRANT OF SUMMARY JUDGMENT WAS CORRECT AS PETITIONER FAILED TO SHOW THAT THERE WERE ANY DISPUTED ISSUES OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT.

A. Contractual Interference

Lamb's allegations of contractual interference stem from his mistaken belief that James Bowyer, acting on

behalf of Union Carbide, hired Norman Mabie in order to facilitate intentionally transferring all the HVAC work away from Lamb's internal work group to Mr. Mabie's work group. From this incorrect factual allegation, Lamb jumps to the equally erroneous legal conclusion that these actions constituted interference with his contract with MTI.

As is evident from the affidavits filed below, Union Carbide canceled its request for an HVAC engineer because it determined that it no longer needed one. Mr. Mabie, on the other hand, was hired to perform general engineering projects. Indeed, at the time of the motion, Mr. Mabie had worked on only one HVAC project. These are facts that are not in dispute. Lamb's imagined allegations of plot by Mr. Bowyer are simply untrue.

Even if one assumes that the allegations are true, they fail to state a claim for interference with contract. Lamb's attempt to claim interference by Union Carbide with his contract with MTI must fail as he cannot allege or prove a prima facie case of interference.

> To establish prima facie proof of tortious interference, a plaintiff must show: (1) existence of a contractual or business relationship or expectancy; (2) an intentional act of interference by a party outside that relationship or expectancy; (3) proof that the interference caused the harm sustained; and (4) damages.

C.W. Development, Inc. v. Structures, Inc. of West Virginia, 185 W.Va. 462, 408 S.E.2d 41, 42 (1991). In this case the courts below correctly determined that Lamb cannot, as a matter of law, meet the second requirement.

The conduct alleged by Lamb does not constitute interference. The propriety of the alleged interference is determined by "examining the factual situation." *C.W. Development*, 185 W.Va. 462, 408 S.E.2d at 44; *see also Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W.Va. 210, 314 S.E.2d 166 (1983) (examining nature of actor's conduct, actor's motive, interests of the other with which the actor's conduct interferes, interests sought to be advanced by the actor, and social interests in protecting the freedom of action of the actor).

Union Carbide's conduct involved exercise of its legitimate contractual rights. Lamb's allegations, while couched in terms of interference with his contract with MTI, in reality amount to a claim that Union Carbide interfered with its own contract with MTI. Union Carbide did not fire Lamb. Rather, it exercised its contractual right to revoke a request for subcontractor services. The only contract that it is alleged that Union Carbide "interfered" with was its own, and the actions it took were permitted under the contract.

Lamb contends that the notification procedures in the contract were not followed. Even if Union Carbide informed the wrong party at MTI, Lamb has no standing to complain of this supposed breach. He presented no evidence of anyone at MTI objecting. Moreover, all Union Carbide could do was rescind its request. It could not fire Lamb. Lamb was not its employee.

West Virginia law is well established – a party to a contract cannot charge another with interfering with the contract between the two. *Shrewsbery v. National Grange Mut. Ins. Co.*, 183 W.Va. 322, 395 S.E.2d 745, 747-48 (1990). If a party cannot use a tort action to punish another for

actions that are within its rights under the contract, then a claim by stranger to the contract is most certainly deficient. This is not a suit between Union Carbide and MTI. Lamb has not chosen to sue MTI. Lamb cannot use a tort action to punish Union Carbide for actions that are within its rights under its contract with MTI. *See Shrewsbery, supra*. Thus, neither the nature of Union Carbide's conduct nor its motives were improper as the interest sought to be advanced by Union Carbide was its legitimate contractual right to terminate its request that MTI provide it with an HVAC engineer when it no longer had a need for the services.

Moreover, Lamb's complaint discloses that as an MTI employee he was terminable by MTI at will. Under these circumstances, Lamb's interest (and the social interests in protecting those interests) are limited. Under West Virginia law, employees terminable-at-will can prosecute intentional interference claims against third-parties only when the employee can show that the defendant used "improper methods." *C.W. Development*, 185 W.Va. 462, 408 S.E.2d at 44 n.3 (*citing Artist v. Virginia Intern. Terminals, Inc.*, 679 F.Supp. 587, 595 (E.D.Va. 1988), *aff'd*, 857 F.2d 977 (4th Cir.1988)). Under this test, "improper methods include means that are illegal or independently torturous, such as violations of statutes, regulations, or well recognized common-law rules." 679 F.Supp. at 595. Lamb cannot make this showing.

Even if Lamb is correct in arguing that Mr. Bowyer wanted him replaced because he was dissatisfied with Lamb's work, such an allegation is not actionable. Even if Lamb was a Union Carbide employee – which he was not – as an at-will employee he could have been dismissed

for Bowyer's alleged reasons or no reason at all. *See Resner v. Watts, Ritter, & Co.*, 73 W.Va. 342, 80 S.E. 839, 840 (1913) (indefinite term employment contract terminable at will of either party); *see also Tow v. Miners Memorial Hospital Association, Inc.*, 199 F.Supp. 926, 932 (S.D.W.Va. 1961) (whether employment contract conditioned on satisfactory performance breached by discharge was not for jury as employer is sole judge of satisfaction), *aff'd*, 305 F.2d 73 (4th Cir. 1962). Lamb's claim (as a non-employee) is even weaker. In this case, Lamb only alleged that Bowyer had improper motives. He has not shown or even alleged any conduct by Union Carbide that meets the *C.W. Development/Artist v. Virginia Intern. Terminals* standard. *At most*, Lamb alleges that Union Carbide mistreated him; the supposed factual disputes are not material and his interference claim fails as a matter of law. *See McKinney v. K Mart, Corp.*, 649 F.Supp. 1217, 1220 (S.D.W.Va. 1986) ("mistreatment alone in the employment context does not give rise to a legally cognizable claim for damages"). Finally, as MTI could remove Lamb for any reason, firing Lamb would not be a breach. Consequently, no action on the part of Union Carbide could result in inducing MTI to breach its contract with Lamb.

Because the undisputed facts establish that Lamb cannot, as a matter of law, meet the required showing of interference, the courts below correctly dismissed his claim of contractual interference.

B. Libel – The Charleston Gazette Article.

Lamb's second claim is that he was libeled by the statements made by Thad Epps, a Union Carbide spokesman, who was quoted in the August 8, 1991 article in the

Charleston Gazette attached to the Petition. From this article, and from Lamb's mistaken belief that he was replaced by Mr. Mabie, Lamb argues that a reader would conclude that *he* was replaced due to marginal performance, and therefore, that the statements are libelous.

In order to recover on a claim for libel, Lamb must allege and prove, among other things, (1) that the statements were defamatory and (2) that they referred to him. *Crump v. Beckley Newspapers, Inc.*, 173 W.Va. 699, 320 S.E.2d 70, 77 (1983). In this case, the courts below correctly determined that Lamb failed to present facts supporting the second element.

The Epps statements cannot be construed as referring to Lamb. In the statements, Mr. Epps was referring broadly to numerous unspecified employees and employees of contractors. He was not referring specifically to Lamb. Moreover, he only indicated that some of the reductions in employees and contractors would be due to performance – the remainder would be due to company needs. As the article notes, there are 3,680 Union Carbide employees in the area that the Epps statements could potentially refer to.

In this case, it is clear that the Epps statements do not identify or refer to Lamb or any other ascertained person. Moreover, it would be impossible for a reader of the statements to even ascertain that any of the statements referred to Lamb let alone the ones that Lamb alleges are defamatory. Under these circumstances, Lamb's allegations are insufficient to support a claim for libel.

The requirement that an allegedly defamatory statement refer to the plaintiff is firmly established. *See Crump*, 173 W.Va. 699, 320 S.E.2d at 77; *Argabright v. Jones*, 46 W.Va. 144, 32 S.E. 995 (1899). When a specific person is not identified by name it must be possible to ascertain his identity. *See Neal v. Huntington Pub. Co.*, 159 W.Va. 556, 223 S.E.2d 792, 795 (1976). Nevertheless, when, as in this case, "the class [of persons referred to] is a very large one, and there is little or nothing which applies to the particular person who brings the action, his right of recovery will generally be denied. . . . [when it cannot] be fairly inferred that persons reading the libelous writing would conclude . . . that the plaintiff was intended to be included as a member of the class." 12A Michie's Jurisprudence of Virginia and West Virginia, *Libel and Slander*, § 17 (1989 Rep. Vol.).

Lamb is not alleging – nor can he – that the statements referred to a restricted group such as a city council. *Cf. Swearingen v. Parkersburg Sentinel Co.*, 125 W.Va. 731, 26 S.E.2d 209 (1943). Nor is he alleging that the statements referred to one particular unnamed, but ascertainable, person such as "the sheriff." *Cf. Neal, supra.* Lamb mistakenly characterizes the statements as only referring to contractors at the South Charleston plant of which he was allegedly the only one laid off. The statements made in the article were much broader than Lamb characterizes them. Mr. Epps was speaking of area-wide action involving the company's 3600 local employees. Indeed, it is not even clear from the article whether the performance reference Lamb complains of applied to contractors at all.

The statements do not, as a matter of law, refer to Lamb. Consequently, the allegations based on the Epps statements were correctly dismissed by the courts below.

C. Slander – The September 10, 1991 Mabie Statements

Lamb's final claim sounds in slander and is based upon the statements allegedly made by Mr. Mabie on September 10, 1991 to Gregory A. Goff, an employee of another Union Carbide Contractor. While initially Union Carbide moved for summary judgment on the grounds that the statements were never made, Lamb's filing of the first Goff affidavit created a factual dispute regarding this issue. Union Carbide, then filed a supplement to its motion for summary judgment asserting that the slander claim should be dismissed because the allegedly slanderous statements were (1) never published and (2) subject to a qualified privilege. The district court based its dismissal of this claim on Lamb's inability to show publication and did not reach the privilege issue. Both grounds, however, support the dismissal in the courts below.

Lamb's initial Goff affidavit alleges that the statements were made by Mr. Mabie to Goff as the two were performing work on behalf of Union Carbide. In his affidavit dated January 31, 1992, Goff states that "[a]t the site, Norman J. Mabie took exception to the design of the system *we were attending*, being critical of the dampers and their operation." Petition at A13 (emphasis added). At the time, both were performing work on behalf of Union Carbide – Goff was a contractor who had been assigned to Union Carbide for six years while Mabie was an employee. *Id.*

Assuming they were actually made, the alleged Mabie statements are privileged. A qualified privilege

exists when statements are made concerning a subject in which the declarant has an interest and is limited to those who have an interest in the subject matter. *See McKinney v. K Mart, supra* (statement from one employee to store manager concerning stolen money privileged); *Mauck v. City of Martinsburg*, 167 W.Va. 332, 280 S.E.2d 216, 221 (1981) (letter from city manager to city council concerning plaintiff's firing privileged). In this case, the two workers were investigating a potential HVAC problem. One allegedly commented about the condition in which he found the site. The comment was concerning the subject matter of their work and was limited to those who had an interest in the work. As such it was privileged.

Lamb contends that the statement was not made about the subject matter of the work because the problem they were investigating was ultimately found not to exist. In his initial affidavit, however, Goff explicitly states that the statements were made concerning the "design of the [HVAC] system we were attending." Goff's later denials of this sworn testimony should be ignored as a party cannot create a disputed issue of fact by presenting affidavits contradicting prior sworn testimony. *See Rorhbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970, 975 (4th Cir. 1990).

Even if Goff's second affidavit is considered, the fact that the statement was made after the two found that the problem of the air loss was somewhere else does not change the conclusion that the alleged statement was made concerning the work. An evaluation of a site condition occurring after a problem has been investigated is still concerning the subject matter of the work – especially when the comment is made at the site by men charged with investigating these problems. Similarly,

Lamb gives no reason why the fact that Goff disagreed with Mabie's alleged comments affects this analysis in the least. Because he was charged with finding the air loss, he had an "interest" in the legal sense in the subject matter of the comment even if he did not agree or was not factually interested in the alleged remark itself.

Finally, Lamb argues that the privilege can be defeated by Mabie's malice towards him. While the privilege can be defeated by a showing of malice, *Mauck v. City of Martinsburg, supra,* the plaintiff has shown no malice on the part of Mr. Mabie to him. The fact that Mabie allegedly repeated the statement when Goff indicated that he did not hear it does not show malice. *Weldy v. Piedmont Airlines, Inc.*, 985 F.2d 57 (2d Cir. 1993), relied on by Lamb is distinguishable as involving the application of New York law and as the plaintiff in *Weldy* provided concrete evidentiary support for his theory of malice.

In addition, as the district court held, the alleged statement was never published by Union Carbide. In order to prevail on a cause of action for slander, the plaintiff must come forward with evidence that the statement was published. *Moore v. American Express, Co.*, 663 F.Supp. 97 (S.D.W.Va. 1987). When allegedly defamatory statements remain entirely within those who have a legitimate business interest in the communication, no publication has occurred. *See Mutafis v. Erie Insurance Exchange,* 561 F.Supp. 192, 197 (N.D.W.Va. 1983). In *Moore*, the district court dismissed a slander claim based upon the statements that the plaintiff was "crazy" and "sick" made in a telephone conversation between two employees of the corporation. The *Moore* court found the conversation

was insufficient to constitute publication under West Virginia law as the two had not published the statement beyond the corporation. *Id.* Similarly, the *Mutafis* Court found that a memorandum noting that the plaintiff was involved in the Mafia was not published when it was discussed by claims adjusters of the defendant insurer. 561 F.Supp at 195-96.

Lamb does not challenge in this Court the district court's finding that a publication did not occur. Below, Lamb contended that the statements were published because Goff's affidavit indicates that he told Lamb that Mabie made the statement. Of course, a publication does not occur merely because the plaintiff hears the statement. *Moore, supra.* Moreover, while Lamb contended below that a third party told him of Mabie's alleged statement, the record contains no affidavits or other evidence to support this bare assertion.

Below Lamb also attempted to distinguish *Moore* on the grounds that *Moore* involved two employees while the instant case involved an employee and an employee of an independent contractor. This distinction makes not a difference. *Moore* is based upon the reasoning that intra-corporate communication to those who have a reason to be informed of the subject matter does not result in a publication. No reasonable distinction can be made between two employees and an employee and another non-employee employed by the corporation to perform its work. When two workers comment about the condition of a work site they were charged to investigate, no publication has occurred.

Simply put, there is no evidence that Mabie communicated the statement to anyone other than Goff. That communication was not a publication. As there is no dispute that the statements are privileged and that they were not published, the dismissal of the slander claims by the courts below should be affirmed.

CONCLUSION

The district court correctly concluded that Lamb's alleged factual disputes were not material. That ruling was correctly affirmed on appeal. Nothing raised by Lamb's petition alters the correctness of those rulings. Consequently, Union Carbide requests that this Court deny the Petition.

Respectfully submitted,

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and Plastics Company,
formerly known as Union
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

CARL V. LAMB,

Plaintiff,

v.

CIVIL ACTION
NO. 2:91-1049

UNION CARBIDE CORPORATION,

Defendant.

REPORT-RECOMMENDATION

(Filed Apr. 17, 1992)

JERRY D. HOGG, UNITED STATES MAGISTRATE JUDGE APRIL 17, 1992

This action is brought by the Carl V. Lamb, pro se, who is a former employee of Midwest Technical, Inc. ("MTI"). On November 28, 1988, Union Carbide Corporation, the defendant, entered into a contract with MTI for the assignment of MTI employees to various Union Carbide facilities. The plaintiff was among the MTI employees assigned to Union Carbide. Lamb alleges that the actions of James Bowyer, manger of plant design services, constituted a tortious interference with his contractual relationship with MTI; that statements made by Thad Epps in a Charleston Gazette article libeled him; and that statements a Union Carbide employee made to another Union Carbide employee were slanderous. This case is presently pending on the parties' cross-motions for summary judgment filed pursuant to Rule 56 of the Federal Rules of Civil Procedure.

On February 3, 1992, this action was referred to Jerry D. Hogg, United States Magistrate Judge, who was designated to consider the pleadings and evidence and submit his proposed findings of fact and recommendation for the disposition thereof pursuant to the provisions of 28 U.S.C. 636(b)(1)(B) and the Revised Local Rules of Practice and Procedure Before United States Magistrates.

Upon consideration of the arguments presented in the briefs submitted by counsel, and for reasons stated more fully below, the undersigned recommends the defendant's motion for summary judgment be granted and, further, recommends that plaintiff's motion for summary judgment be denied.

On November 28, 1988, Union Carbide Corporation, the defendant, entered into a contract with MTI for the assignment of MTI employees to various Union Carbide facilities. The contract provided that such services were temporary. The agreement also provided that Union Carbide could terminate work or work projects to which MTI's employees were assigned at any time.

According to the Bartrug affidavit attached to defendant's Motion for Summary Judgment, pursuant to the contract, Union Carbide requested that MTI provide it an engineer to perform certain technical work for Plant Engineering at Union Carbide's South Charleston Plant consisting primarily of engineering in the area of heating, ventilation, and air conditioning ("HVAC") in an industrial setting. Pursuant to this request, MTI assigned Carl V. Lamb, one of its employees, to perform the requested work.

In mid 1991, Union Carbide apparently determined that it no longer needed MTI to provide it with an engineer to perform HVAC work according to the Bartrug affidavit. Therefore, Union Carbide notified MTI that it was terminating its request for an engineer to perform HVAC work. *Id.* Apparently, Lamb was subsequently laid off by MTI and after Union Carbide revoked its request for MTI to provide an engineer. Complaint at ¶ 8.

In the complaint, Lamb alleges that Norman J. Mabie, who was retained by Union Carbide as an engineer prior to its determination that MTI's HVAC engineer was no longer needed, was hired by James Bowyer as part of a plot to transfer HVAC work away from Lamb's internal work to Mr. Mabie's work group, the group managed by G. R. Hattiangadi. Complaint at ¶ 7.

The plaintiff made the following allegation which forms the basis for his second claim:

> On August 8, defendant published an article in the Charleston Gazette (plaintiff's Exhibit A attached) containing an innuendo 'for a person who feels his performance is marginal who feels his job is not one that is important to the overall mission of the corporation, that person might have some apprehension'. Plaintiff alleges that the article suggests that persons would be terminated for either of the two reasons stated; that persons who read the article might conclude that plaintiff's performance had been marginal; that since he was replaced, the portion of the innuendo referring to the overall mission of the corporation would not apply, leaving only marginal performance to be concluded as the reason for his termination. Plaintiff alleges that he was

> libeled by the publishing of the article and his termination on the day after.

Complaint at ¶ 9. According to his affidavit attached to defendant's Motion for Summary Judgment, Thad Epps, the Union Carbide spokesman quoted in the article, had never met or even heard of the plaintiff before being advised of the filing of the complaint in this action.

Plaintiff's third claim stated in paragraph 10 of the complaint, as amended, is:

> On the 10th day of September, 1991, on visiting the site of a control room where the plaintiff had performed services, defendant's employee, N. J. Mabie, in the course of his employment, made the following statement to a third-party, 'this must be another one of Carl Lamb's screw-ups'. This remark was untrue and was defamatory. It was made without privilege and implies that the plaintiff was incompetent. It was slander per se. This statement was made for the sole purpose of defaming the plaintiff, was not made for the purpose of protecting any interests of the defendant, nor for any other reason than causing harm to the plaintiff's reputation in his field of expertise.

The "third-party" is subsequently identified as Gregory Goff in plaintiff's supplemental pleading.

In his complaint, Lamb asserts that James Bowyer's actions constituted an interference with his contractual relationship with MTI. Lamb's allegations of contractual interference stem from his belief that James Bowyer, acting on behalf of Union Carbide, hired Norman Mabie to perform HVAC work and transfer all work from Lamb's group to Mabie's group. Plaintiff alleges that this action

was an interference in his contractual relationship with MTI and resulted in his loss of employment.

Assuming these allegations are true, they fail to state a claim for interference with contract. The plaintiff has failed to show, as a matter of law, interference with his contract.

> To establish prima facie proof of tortious interference, a plaintiff must show: (1) existence of a contractual or business relationship or expectancy; (2) an intentional act of interference by a party outside that relationship or expectancy; (3) proof that the interference caused the harm sustained; and (4) damages.

C.W. Development, Inc. v. Structures, Inc. of West Virginia, 408 S.E.2d 41, 43 (W.Va. 1991). Clearly, Lamb cannot meet either of the second or third requirements.

First, the conduct alleged by Lamb does not constitute interference. The Supreme Court of Appeals has reviewed the factors listed in the Restatement (Second) of Torts, § 767. *Id.* In *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 314 S.E.2d 166 (W.Va. 1983), the Court described the Restatement factors:

> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors: (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the

> proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties.

Id. at 172 n. 12.

Review of Union Carbide's actions, in relation to these factors, reveals that there was no improper interference. Union Carbide merely exercised its legitimate contractual rights. The contract provided under Article VI that "the Owner [Union Carbide] may terminate work or work projects to which Contractor's [MTI] employees are assigned at any time and without restriction and Contractor shall increase or decrease, as requested by Owner, the number of its employees assigned hereunder." Contract, Exhibit 1 to defendant's Motion for Summary Judgment at p. 3. The fact is, the plaintiff was an employee of MTI and was apparently terminated by MTI. However, in light of the language in the Contract, Union Carbide simply exercised its contractual right to revoke a request for subcontractor services. There is no allegation that Union Carbide had any responsibility or connection in the separation of Lamb from MTI. Although plaintiff stated in paragraph 8 of his complaint that the actions of J. A. Bowyer were the "proximate cause of his loss of employment," Lamb has not made a causal relationship between the actions of Bowyer and the contractual relationship between Lamb and MTI. As the defendant points out, the only contract that Union Carbide allegedly "interfered" with was its own. And the actions Union Carbide took were permitted under the contract.

The defendant further notes that it is well established in this state that one party cannot charge another with interfering with the contract between the two:

> It is impossible for one party to a contract to maintain against the other party to the contract a claim for tortious interference with the parties' own contract. Neither party is a stranger to the contract. Each party has agreed to be bound by the terms of the contract itself, and may not thereafter use a tort action to punish the other party for actions that are within its right under the contract.

Shrewsbery v. National Grange Mut. Ins. Co., 395 S.E.2d 745, 747-48 (W.Va. 1990). In other words, a party to a contract cannot bring an action for tortious interference. In the same vein, a non-party to a contract cannot maintain a claim for tortious interference against a party to a contract to which the non-party is not a part. Accordingly, Lamb cannot use a tort action to punish Union Carbide for actions that are within its rights under its contract with MTI. *See Shrewsbery, supra.*

The plaintiff takes issue with the concept in *Shrewsbery* that a non-party cannot bring an action to punish another for actions that are within its rights under the contract. However, it is simply not enough that, as he states, "defendant harmed him in his contractual relations and economic expectations." Plaintiff's Response to Defendant's Motion for Summary Judgment; Plaintiff's Motion for Partial Summary Judgment on Issue of Liability, p. 5. As the defendant succinctly states, neither the nature of Union Carbide's conduct nor its motives was improper as the interest sought to be advanced by Union Carbide was its legitimate contractual right to terminate its request that MTI provide it with an HVAC engineer when it no longer had a need for the services, when considered in the context of the Restatement factors.

Finally, the Supreme Court of Appeals of West Virginia has recognized that employees terminable-at-will can prosecute intentional interference claims against third-parties only when the employee can show that the defendant used "improper methods." *C.W. Development*, 408 S.E.2d at 44 n. 3 (*citing Artist v. Virginia Intern. Terminals, Inc.*, 679 F.Supp. 587, 595 (E.D.Va. 1988), *aff'd*, 857 F.2d 977 (4th Cir. 1988)). The Court in *Virginia Intern. Terminals* explained:

> Clearly, as discussed above, this employment contract, having no definite term, is terminable-at-will. While interference with such a contract may provide the basis of an action for tortious interference, the extent of permissible third-party interference increases as the degree of enforceability of a business relationship decreases. Consequently, *when a contract is terminable at will*, a plaintiff, in order to present a prima facia case of tortious interference, must allege and prove not only an *intentional* interference that caused the termination of the at-will contract, but also that the defendant employed *improper* methods. Such improper methods include means that are illegal or independently tortious, such as violations of statutes, regulations, or well recognized common-law rules. *Id.*

679 F.Supp. at 595 (emphasis in original; citations and internal quotations omitted). Plaintiff has not alleged that Bowyer acted to intentionally interfere with Lamb's contract with MTI. Further, Lamb has not alleged any illegal or independently tortious actions on the part of Bowyer or any other Union Carbide employee to interfere with his employment agreement with MTI.

Because the plaintiff has not alleged facts which constitute interference, Lamb cannot meet the third element listed in *C.W. Development* as he cannot show that Union Carbide's actions caused his alleged damages. The plaintiff has not alleged any act on the part of Union Carbide which constitutes an act of intentional interference. Even if Lamb's allegation that Bowyer transferred the HVAC work away from Lamb's work group, the plaintiff has not stated how this constitutes tortious interference. Therefore, damages cannot accrue from an interference which never occurred.

Plaintiff's second claim is that he was libeled by the statements made by Thad Epps, a Union Carbide spokesman, who was quoted in an article in the Charleston Gazette on August 8, 1991. Exhibit A to Complaint. Based on his belief that he was replaced by Mabie, plaintiff alleges in paragraph 9 of his complaint that a reader would conclude that he was replaced due to marginal performance and, therefore, the statements are libelous. In order to recover on a claim for libel, Lamb must allege and prove, among other things, (1) that the statements were defamatory and (2) that they referred to him. *Crump v. Beckley Newspapers,* 320 S.E.2d 70, 77 (W.Va. 1984). Lamb cannot meet the burden of proof required to establish his claim.

The quotations attributed to Mr. Epps cannot be considered defamatory with respect to the plaintiff. Notably, the plaintiff is never mentioned by name, title, or job description in the article, which is attached to the complaint. A defamatory statement is one that "tends to harm the reputation of another so that to lower him in the estimations of the community or to deter their persons

from associating or dealing with him. *Id.* (quoting Restatement) (Second) (Statement of Torts § 559). Further, the allegedly defamatory statement must refer to the plaintiff. *See Crump,* 320 S.E.2d at 77; *Argabright v. Jones,* 32 S.E. 995 (W.Va. 1899). When a specific person is not identified by name it must be possible to ascertain his identity. *See Neal v. Huntington Pub. Co.,* 233 S.E.2d 792, 795 (W.Va. 1976).

Clearly, the statement made by Epps does not identify or refer to Lamb. Even if the statement regarding termination could be considered damaging to an individual's reputation, there is no specific or even general reference to Lamb. Accordingly, the undersigned must conclude that Lamb's assertion that a reader of the statements would ascertain that the statements referred to him is unfounded. Therefore, Lamb's claim of libel must fail.

Finally, the plaintiff's third claim is based upon statements allegedly made by Mr. Mabie on September 10, 1991, to Gregory Goff. According to Mabie's affidavit, he never made the slanderous statement nor made any criticism of Lamb's work to any person. In his affidavit, attached to Plaintiff's Response to Defendant's Motion for Summary Judgment, Goff testified that Mabie did make such statement in his presence. Even if the statement was made, it does not constitute actionable slander as the statement was not published. Allegedly, the statement was made by Mabie to Goff, both agents of Union Carbide. As Goff's affidavit establishes that both were acting within their agency as they were investigating HVAC problems. As such, the communication was made between agents of the corporation and was within the scope of their agency. Consequently, the statement was

not published. *See Moore v. American Express Co.*, 663 F.Supp. 97 (S.D.W.Va. 1987) (dismissing slander claim when reference to plaintiff as "crazy" and "sick" made by one agent of the corporation to another holding that no publication occurred.). As the plaintiff has not alleged a cause of action for slander, it is the recommendation of the undersigned that this claim should also be dismissed.

Accordingly, for the reasons stated above, it is

RECOMMENDED that defendant's motion for summary judgment be granted, plaintiff's motion for summary judgment be denied, and this case be dismissed.

Plaintiff and defendant are hereby notified that a copy of this **REPORT-RECOMMENDATION** will be submitted by the Clerk to the Honorable Charles H. Haden II, Chief Judge, and that, in accordance with the provisions of Rule 72(b), Federal Rules of Civil Procedure, the parties may, within 13 days of the date of filing of this **REPORT-RECOMMENDATION** serve and file written objections with the Clerk of this court, identifying the portions of the **REPORT-RECOMMENDATION** to which objection is made and the basis for such objections. The Judge will make a *de novo* determination of those portions of the **REPORT-RECOMMENDATION** to which objection is made in accordance with the provisions of 28 U.S.C. 636(b) and the parties are advised that failure to file timely objections will result in a waiver of their right to appeal from a judgment of the district court based on such **REPORT-RECOMMENDATION**. Copies of objections shall be served on all parties with copies of the same to Judge Haden and this Magistrate Judge.

The Clerk is directed to file this **REPORT-RECOMMENDATION** and mail a copy of the same to the plaintiff and to counsel of record.

ENTER: April 17, 1992.

/s/ Jerry D. Hogg
JERRY D. HOGG
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CARL V. LAMB,

Plaintiff,

v. CIVIL ACTION NO. 2-91-1049

UNION CARBIDE CORPORATION,

Defendant.

AFFIDAVIT

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

This day personally appeared before me the undersigned authority, Barbara J. Toler, who being by me first duly sworn on her oath, deposes and says as follows:

1. That I am a Purchasing Agent for Union Carbide Chemicals and Plastics Company Inc., formerly known as Union Carbide Corporation ("Union Carbide").

2. That I have personal knowledge of the statements made in this affidavit.

3. That on November 28, 1988 Union Carbide entered into a contract with Midwest Technical, Inc. ("MTI") for the temporary assignment of MTI employees in various classifications under the terms of that contract; that contract provided, among other things, the following provision:

> Owner [Union Carbide Corporation] expressly reserves the right to enter into contracts with other contractors for the same or similar services. It is understood and agreed between the

parties hereto that owner does not guarantee to Contractor [MTI] any specific amount or days of work to be performed by Contractor under this agreement. It is understood that Owner may designate or not designate work projects to be performed by Contractor, or may terminate work or work projects to which Contractor's employees are assigned at any time and without restriction and Contractor shall increase or decrease, as requested by Owner, the number of its employees assigned hereunder.

4. That pursuant to this contract between Union Carbide Corporation and MTI, MTI made a temporary assignment of its employee, Carl Lamb, to provide certain technical services.

5. That the contract further provided:

Article 1 – Scope of Services

(a) Through the temporary assignment of its own employees in the classifications set forth in EXHIBIT "A" entitled "JOB CLASSIFICATIONS AND RANGES OF RATES FOR TEMPORARY TECHNICAL PERSONNEL", attached hereto and made a part of this Agreement, Contractor shall provide to Owner, as requested by Owner from time to time during the term of this Agreement, the services hereinafter called the "Work".

Further this affiant saith not.

/s/ Barbara J. Toler
Barbara J. Toler

The foregoing instrument was acknowledged before me this 8th day of January, 1992, by Barbara J. Toler.

My commission expires March 20, 2001.

[SEAL]

/s/ Janice S. Marsh
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CARL V. LAMB,

Plaintiff,

v. CIVIL ACTION NO. 2-91-1049

UNION CARBIDE CORPORATION,

Defendant.

AFFIDAVIT

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

This day personally appeared before me the undersigned authority, E. M. Bartrug, Jr., who being by me first duly sworn on his oath, deposes and says as follows:

1. That I am the Manager, Plant Engineering, of the South Charleston Plant, Union Carbide Chemicals, and Plastics Company Inc., formerly known as Union Carbide Corporation ("Union Carbide").

2. That I have personal knowledge of the statements made in this affidavit.

3. That pursuant to the contract between Midwest Technical, Inc. ("MTI") and Union Carbide, Union Carbide requested that MTI provide it an engineer to perform certain technical work for Plant Engineering at the South Charleston Plant consisting primarily of engineering in the area of heating, ventilation and air conditioning ("HVAC") in an industrial setting.

4. That pursuant to this request, MTI assigned Carl V. Lamb, one of its employees, to perform the requested work.

5. That by mid 1991 the amount of HVAC work needed to be performed had decreased sharply. As a result, it was determined that Union Carbide no longer needed MTI to provide it with an engineer to perform HVAC work. Therefore, pursuant to the contract between Union Carbide and MTI, Union Carbide notified MTI that it was terminating its request for an engineer to perform HVAC work.

6. That prior to this determination, Norman J. Mabie was hired as an employee of Union Carbide as an engineer. Although Mr. Mabie does have some HVAC background and may undertake some of the little HVAC work that now needs to be done, Mr. Mabie was not hired to replace Carl Lamb and in fact works for a different internal Group than that for which Mr. Lamb performed his services.

Further this affiant saith not.

/s/ Edwin M. Bartrug, Jr.
E. M. Bartrug, Jr.

The foregoing instrument was acknowledged before me this 8th day of January, 1992, by E. M. Bartrug, Jr.

My commission expires March 20, 2001.

[SEAL]

/s/ Janice S. Marsh
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CARL V. LAMB,

Plaintiff,

v. CIVIL ACTION NO. 2-91-1049

UNION CARBIDE CORPORATION,

Defendant.

AFFIDAVIT

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

This day personally appeared before me the undersigned authority, James A. Bowyer, who being by me first duly sworn on his oath, deposes and says as follows:

1. That I am the manager, project design services, of the South Charleston Plant, Union Carbide Chemical and Plastics Company, Inc., formerly known as Union Carbide Corporation ("Union Carbide").

2. That I have personal knowledge of the statements made in this affidavit.

3. That I have reviewed paragraph 6 of the Complaint filed by Carl V. Lamb, the plaintiff in this action, and I neither – in 1989 or at any other time – threatened to replace Carl Lamb or state to any third party that I was going to get Carl Lamb.

4. That Norman J. Mabie was hired as a general purpose mechanical engineer and placed in the work group supervised by G. R. Hattiangadi. He was not hired

in order to facilitate the transfer of all the heating, ventilation and air conditioning ("HVAC") work away from the work group managed by A. B. Williamson, as alleged in paragraph 7 of the plaintiff's Complaint.

5. That the implication in paragraph 7 of the plaintiff's Complaint that I transferred all HVAC work away from the work group managed by A. B. Williamson to the work group managed by G. R. Hattiangadi is untrue. In mid-1991 the amount of HVAC work that needed to be performed at the South Charleston Plant had decreased sharply. Consequently, although Norman Mabie was hired in order to perform general mechanical engineering tasks, Union Carbide was aware that Mabie had some background in HVAC work, and it was determined that the minimal remaining HVAC work could be performed by Normal Mabie in addition to his mechanical engineering duties.

6. That as of this date Norman Mabie has only worked on one HVAC project.

Further this affiant saith not.

/s/ James A. Bowyer
James A. Bowyer

The foregoing instrument was acknowledged before me this 8th day of January, 1992, by James A. Bowyer.

My commission expires March 20, 2001.

[SEAL]

/s/ Janice S. Marsh
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CARL V. LAMB,

Plaintiff,

v. CIVIL ACTION NO. 2-91-1049

UNION CARBIDE CORPORATION,

Defendant.

AFFIDAVIT

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

This day personally appeared before me the undersigned authority, Thad Epps, who being by me first duly sworn on his oath, deposes and says as follows:

1. That I am a Spokesman for Union Carbide Chemicals and Plastics Company, Inc., formerly known as Union Carbide Corporation ("Union Carbide").

2. That I have personal knowledge of the statements made in this affidavit.

3. That I have reviewed plaintiff's EXHIBIT "A" attached to the Complaint in the above-styled civil action.

4. That I have never heard of Carl Lamb before being advised of the filing of the above-styled civil action by Union Carbide's attorneys. At the time I made the statements referred to in plaintiff's EXHIBIT "A", I was not referring to Carl Lamb.

Further this affiant saith not.

/s/ Thad D. Epps
Thad Epps

The foregoing instrument was acknowledged before me this 7th day of January, 199_, by Thad Epps.

My commission expires June 8, 1998.

[SEAL]

/s/ Lesley A. Burriss
Notary Public